UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MZEE BARAKA HARRIS, Petitioner, v. BENEDICT MARTINEZ, Respondent.	CASE NO.: C06-0954-JLR REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is in the custody of the Washington Department of Corrections pursuant to his 2002 King County Superior Court convictions for first degree rape and second degree assault.[1] He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from those convictions. Respondent has filed an answer to the petition and has submitted relevant portions of the state court record. The briefing is now complete, and this matter is ripe for review. This Court, having reviewed the petition, respondent's answer thereto, and the state court record,

[1] Petitioner was also convicted on a charge of first degree kidnaping, but that conviction was vacated at the time of petitioner's sentencing.

concludes that petitioner's federal habeas petition should be denied and this action should be dismissed with prejudice.

FACTS AND PROCEDURAL BACKGROUND

The Washington Court of Appeals summarized the facts of petitioner's case as follows:

> Auburn police officers were summoned to a restaurant on the afternoon of Sunday, March 3, 2002, by a call from Brandy Bonin-Gamble. All visible parts of Bonin-Gamble's body showed marks of a severe beating, and she was extremely distraught. Bonin-Gamble told police that her boyfriend, petitioner Mzee Harris, had beaten her and was at the nearby Auburn Motel. An officer found Harris, drew his gun and ordered Harris to stop, but Harris sped away in his truck. When the police chased him, Harris abandoned his truck and escaped.
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> The emergency room doctor who treated Bonin-Gamble said her injuries were "incredible" in that "there was not an inch on her body that did not have a hematoma, or a bruise." Some bruises displayed the shapes of a belt strap, some a belt buckle and one the sole of a shoe. The injuries appeared fresh and were consistent with Bonin-Gamble's report that she had been kicked and beaten all over with fists, a belt, and a baseball bat. Bonin-Gamble said that the day before, Harris came to her room at a Motel 6, demanded entry, and began beating her. He then took her to his parent's house and beat her with a baseball bat. Later he took her to a different motel where he beat her through the night, including flailing her with his belt after making her strip. Harris then took her to his friends' house and finally to the Auburn motel where she used a ruse to flee.
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> Bonin-Gamble's injuries included vaginal lacerations and bruises to her buttocks, inner thighs and labia, which led hospital staff to ask if she had been raped. Bonin-Gamble said no while male police officers were present, but later told female medical staff that Harris had repeatedly raped her. Vaginal swabs showed quantities of semen containing sperm with motility suggesting recent sexual intercourse. DNA testing showed the semen was Harris's.
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> The State charged Harris with first degree kidnapping, three counts of first degree rape, and two counts of second degree assault. It also charged him with second degree assault for a February incident in which Bonin-Gamble said he stabbed her leg with a barbecue fork.
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> At trial, in addition to Bonin-Gamble, the State called three young men who stayed next door to her on Saturday, March 2, at the Motel 6. They testified they heard a man shouting to be let in, followed by a woman's screams of pain. They later

> saw the couple leave, the woman holding a towel to her swollen and bleeding face. One of the men identified Harris from a photo montage. Forensic evidence included an autographed baseball bat from a display case in Harris's parents' home with Bonin-Gamble's and Harris's blood on it. At the Auburn hotel, police found blood on a sheet and semen on a towel in Harris's room. Police also found blood spatter and Bonin-Gamble's medication in the Motel 6 room.
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> Harris testified that he tried to end his relationship with Bonin-Gamble after she lied about using drugs and falsely claimed to be pregnant with his child. On Friday, March 1, however, Bonin-Gamble called him to her room at the Motel 6 where they had sex. She called him back to the room the next day, then appearing to be injured and on drugs. She said a former boyfriend, Rodney, had beaten her. Though Harris and Bonin-Gamble argued and she attacked Harris, he rented a room at another motel for her. He met friends at the new motel, and they left Bonin-Gamble alone while getting food from an Applebee's restaurant. Harris slept in the room with Bonin-Gamble that night, but they did not have sex. At his parent's house the next day, she attacked him with the bat. He later drove her to his friends' and the Auburn motel, where he only ran from police because he feared they would shoot him. Harris testified his only sex with Bonin-Gamble that weekend was the consensual sex on Friday.
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> Harris's family members testified that Bonin-Gamble had attempted to insinuate herself into his family. Defense witnesses who saw Harris and Bonin-Gamble over the weekend testified there were times that Bonin-Gamble was alone and could have escaped and that she did not ask for medical treatment. In addition, a defense medical expert challenged the State's expert testimony about how recent Bonin-Gamble and Harris's sexual intercourse could have been.
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> The jury found Harris guilty of first degree kidnapping, two of the counts of first degree rape and both second degree assault counts for the March charges, but acquitted him of the February assault charge and did not reach a verdict on the third count of rape. The sentencing court found Harris committed the offenses with deliberate cruelty and imposed a 420-month exceptional sentence.

(Dkt. No. 18, Ex. 2 at 2-4.)

Following his sentencing, petitioner filed a direct appeal in the Washington Court of Appeals. However, he subsequently moved to dismiss his direct appeal on the grounds that the issues he wished to raise were better presented by way of a personal restraint petition. (*See id.*,

Ex. 3.) The Court of Appeals granted petitioner's motion, and petitioner's appeal was dismissed on February 2, 2004. (*Id.*, Ex. 4.) The Court of Appeals issued its mandate on the same date. (*Id.*, Ex. 5.)

On January 28, 2005, petitioner, through counsel, filed a personal restraint petition in the Washington Court of Appeals. (*Id.*, Ex. 6.) Petitioner presented the following grounds for relief to the Court of Appeals for review:

> 1. Trial counsel's failure to call Warren Hagler to testify regarding his conversation with Brandy Gamble-Bonin constituted a denial of the Sixth Amendment right to effective representation of counsel.
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> 2. Trial counsel's failure to present the Applebee's Restaurant receipt constituted a denial of the Sixth Amendment right to effective representation of counsel.
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> 3. Trial counsel's failure to object to the prosecutor's inaccurate description of the evidence of a receipt for a purchase of food from McDonald's restaurant, and to the prosecutor's inflammatory argument regarding what the evidence showed, constituted ineffective assistance of counsel and a violation of the Sixth Amendment.
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> 4. The prosecutor's inflammatory appeal to passion and prejudice, by improperly suggesting to the jury that after raping and assaulting the complaining witness the defendant made her go with him to a restaurant where he ordered food for himself but none for her, denied the defendant a fair trial contrary to the Due Process Clause of the Fourteenth Amendment.

(Dkt. No. 18, Ex. 6 at 37-38.)

Petitioner also argued to the Court of Appeals that his exceptional sentence violated the rule announced in *Blakely v. Washington*, 542 U.S. 296 (2004). (*See id.*, Ex. 6 at 55-61.) On January 23, 2006, the Court of Appeals issued an unpublished opinion denying petitioner's personal restraint petition. (*Id.*, Ex. 2.)

Petitioner thereafter filed a motion for discretionary review in the Washington Supreme Court. (*Id.*, Ex. 8.) Petitioner presented the following issues to the Supreme Court for review:

> 1. Did trial counsel's failure to interview or call exculpatory witness Warren Hagler to testify regarding his conversation with complainant Brandy Gamble-Bonin constitute a denial of the Sixth Amendment right to effective representation of counsel?
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> 2. Did trial counsel's failure to present exculpatory evidence in the form of an Applebee's Restaurant receipt constitute a denial of the Sixth Amendment right to effective representation of counsel?
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> 3. Did trial counsel's failure to object to the prosecutor's inaccurate description of the evidence of a receipt from a McDonald's restaurant, and to the prosecutor's inflammatory argument, constitute ineffective assistance of counsel and a violation of the Sixth Amendment?
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> 4. Did the prosecutor's inflammatory appeal to passion and prejudice, by improperly suggesting to the jury that after raping and assaulting the complaining witness the defendant made her go with him to a restaurant where he ordered food for himself but none for her, deny the defendant a fair trial contrary to the Due Process Clause of the Fourteenth Amendment?

(Dkt. No. 18, Ex. 8 at 1.)

Petitioner also argued to the Supreme Court that the cumulative prejudicial effect of trial counsel's deficient conduct constituted ineffective assistance of counsel. (*Id.*, Ex. 8 at 19.) Petitioner did not present to the Supreme Court any claim that his exceptional sentence violated the rule announced in *Blakely*.

On April 28, 2006, the Supreme Court Commissioner issued a ruling denying petitioner's motion for discretionary review. (*Id.*, Ex. 9.) Petitioner moved to modify the Commissioner's ruling denying review, but that motion was also denied. (*See id*, Exs. 10 and 11.) On July 25, 2006, the Court of Appeals issued a mandate terminating petitioner's personal restraint

proceedings. (*Id.*, Ex. 12.)

Petitioner, through counsel, filed the instant petition for federal habeas review under § 2254 on July 7, 2006.

GROUNDS FOR RELIEF

Petitioner asserts the following four grounds for relief in his federal habeas petition:

GROUND ONE: Ineffective assistance of counsel for failure to interview and call witness, Warren Hagler.

Supporting facts: Mzee Harris' sister, Malika Harris, met Warren Hagler in 2002, and he told her that he had spoken with Brandy Gamble-Bonin about the trial. Brandy told Hagler that Mzee Harris had assaulted her but nothing more, that the police were pressuring her to testify against Mzee Harris, and that the police threatened to put her in jail if she did not say what they wanted her to say. Malika told her mother, Billie Harris, about Warren Hagler, and Ms. Harris told Mr. Crowley before the trial. Crowley said he would contact Hagler. Crowley never contacted Hagler, nor did Hagler testify at trial. Hagler states in his declaration he would have testified about Brandy's statements at trial on Mr. Harris' behalf if he had been contacted by Crowley.

GROUND TWO: Ineffective assistance of counsel for failure to present Applebee's Restaurant receipt into evidence.

Supporting facts: Private investigator Bonnie Steckler, hired by Mr. Harris' defense counsel, interviewed both defendant and Mr. Carllen re the Applebee's Restaurant receipt. Mr. Carllen gave Applebee [sic] receipt to Ms. Steckler, who taped the receipt to a large sheet of paper and gave it to defense counsel Crowley before trial. Crowley has lost documents that Steckler has given him in the past. Steckler did not keep a copy of the receipt. Ms. Steckler's declaration attesting to these facts were filed with Mr. Harris' PRP.

GROUND THREE: Ineffective assistance of counsel for failure to object to prosecutor's misconduct at closing argument.

Supporting facts: In closing argument, defense counsel emphasized that both Muhammad and Carllen testified that Harris left the motel room to go pick up food leaving Brandy in the room. "They get food, there is the receipt, it happened, Brandy was able to leave on her own accord, she didn't because she didn't want to. Because indeed, she had not been raped." RP XI, 144. In rebuttal, the prosecutor suggested

that Muhammad and Carllen were lying when they said Harris left the room, and that the proof of this was that while they talked about a receipts from Applebee's, no receipt was presented at trial. "Mr. Crowley mentioned a receipt. There was no receipt from Applebee's . . . only a receipt from McDonalds." RP XI, 154-55. The McDonald's receipt actually listed two meals.

GROUND FOUR: Ineffective assistance of counsel.

Supporting facts: Grounds 1-3 accumulated to cause prejudicial effect.

GROUND FIVE: Challenge to exceptional sentence imposed under Blakely v. Washington, 542 U.S. 296 (2004) for judicial finding of deliberate cruelty.

Supporting facts: The sentencing court found Mr. Harris committed the offenses with deliberate cruelty and imposed a 420 month exceptional sentence. Findings of Fact & Conclusions of Law re: Exceptional Sentence filed 4/22/03.

(Dkt. No. 1 at 5, 7, 8, 10, and 14.)

DISCUSSION

Respondent states in his response to the petition that petitioner properly exhausted his state court remedies with respect to the claims set forth in his federal habeas petition by fairly presenting each of those claims to the Washington Supreme Court as federal constitutional claims. While respondent is correct that petitioner properly exhausted his first four grounds for federal habeas relief, respondent overlooks the fact that petitioner actually identified five grounds for relief in his petition and that the fifth ground for relief was not properly exhausted in the state courts because the claim was never presented to the Washington Supreme Court for review.

However, the fact that petitioner failed to properly exhaust his *Blakely* claim, and that respondent failed to respond in any way to this claim, does not preclude review of the claim by this Court. Section 2254(b)(2), provides that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available

in the courts of the State." As will be explained in more detail below, this Court deems petitioner's *Blakely* claim to be without merit and therefore subject to denial even absent exhaustion.

Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's decision was *contrary to*, or involved an *unreasonable application of*, clearly established federal law, as determined by the Supreme Court, or if the decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis added).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id*. The Supreme Court has made clear that a state court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 69 (2003).

Ineffective Assistance of Counsel

Petitioner asserts in his petition that he was denied the effective assistance of counsel when his trial counsel, John Crowley, failed to (1) interview and call witness Warren Hagler; (2) to present the Applebee's Restaurant receipt as evidence at trial; and (3) to object to the prosecutor's

closing argument. Petitioner also asserts that the ineffective assistance alleged in his first three grounds for relief cumulatively caused a prejudicial effect.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland*. Under *Strickland*, a defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness and, (2) that a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 688, 691-92.

When considering the first prong of the *Strickland* test, judicial scrutiny must be highly deferential. *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel's performance fell within the wide range of reasonably effective assistance. *Id*. The Ninth Circuit has made clear that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (quoting *Strickland*, 466 U.S. at 689).

The second prong of the *Strickland* test requires a showing of actual prejudice related to counsel's performance. The petitioner must demonstrate that it is reasonably probable that, but for counsel's errors, the result of the proceedings would have been different. The reviewing Court need not address both components of the inquiry if an insufficient showing is made on one component. *Strickland*, 466 U.S. at 697. Furthermore, if both components are to be considered, there is no prescribed order in which to address them. *Id*.

1. Failure to Interview and Call Witness Warren Hagler

Petitioner asserts in his first ground for relief that his trial counsel's failure to interview Warren Hagler and to present him as a defense witness at trial constituted ineffective assistance of counsel. The state courts rejected this claim in petitioner's personal restraint proceedings.

The Court of Appeals explained its conclusion as follows:

> Warren Hagler. Harris has provided a sworn declaration by Warren Hagler, who has known Harris since the two were incarcerated together in a juvenile facility. In the summer of 2002, while looking for prostitutes to work for him in another state, Hagler met a young woman named Brandy. Brandy said she would not leave the state because she had to testify. She said a man had assaulted her, but police were threatening her to make her testify to more than just an assault so he would get a longer sentence. Only when Brandy said the man's name was Mzee Harris, did Hagler realize she was talking about his friend. Later that summer, Hagler happened to meet a girl named Malika. When he told Malika about Brandy, he learned for the first time that Malika was Harris's sister. From Hagler's description, Malika knew Hagler had met Bonin-Gamble. According to declarations by Malika Harris and Harris's mother, they relayed Hagler's information to Crowley, but Crowley never contacted him.
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> Harris argues there was no legitimate reason for failing to interview Hagler and call him to testify. He contends he was prejudiced because there was a reasonable chance the jury would have acquitted him of all charges had they heard Hagler's testimony. We disagree with both contentions.
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> In evaluating counsel's actions, we must "reconstruct the circumstances of counsel's challenged conduct, and . . . evaluate the conduct from counsel's perspective at the time."[2] Contrary to Harris's contention, defense counsel's duty to investigate "does not necessarily require that every conceivable witness be interviewed."[3] Rather, the duty is either to make a reasonable investigation or to

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[2] [Court of Appeals' Footnote 7] Strickland, 466 U.S. at 689.

[3] [Court of Appeals' Footnote 8] In re Pers. Restraint of Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004) (quoting Bragg v. Galaza, 242 F.3d 1082, 1088, amended by 253 F.3d 1150 (9th Cir. 2001)) (internal quotation marks omitted).

make a reasonable decision that makes particular investigations unnecessary.[4]

> Crowley could reasonably have viewed Hagler's potential testimony as problematic. First, it diverged from the defense theory of the case that "Rodney" had assaulted Bonin-Gamble and Harris had only tried to help her. Evidence that Bonin-Gamble had been consistent in saying that Harris had assaulted her could be seen as inconsistent with Harris's claim of complete innocence. Second, a major defense theme was that Harris was a well-intentioned young man from a stable middle class family into which the drug-involved Bonin-Gamble was trying to insinuate herself. Calling Hagler could have required disclosing his connection to Harris, the circumstances of Hagler's meeting with Bonin-Gamble, and at least the portion of Hagler's criminal history. Were the jury to learn he had committed crimes of dishonesty, not to mention his history of promoting prostitution, the disclosures would have severely detracted from that theme. Finally, Hagler's proposed testimony describes a sequence of coincidences that might reasonably be considered highly unlikely.
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> Given this, Crowley could justifiably view Hagler as a witness who would cause more harm than good. This case is unlike State v. Byrd,[5] which Harris cites. In Byrd, the issue was consent, not identity, and counsel failed to investigate an eyewitness to the victim's demeanor at a time she said she was being forced to accompany defendants against her will.[6]
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> Harris has also failed to show prejudice. While Bonin-Gamble's credibility was in issue, the split verdict shows the corroboration provided by the medical and forensic evidence and the young men from the next room is what led the jury to convict on most counts. Harris has not shown Hagler's proposed testimony would likely have affected the jury's view of this crucial evidence.

(Dkt. No. 18, Ex. 2 at 5-7.)

The Court of Appeals' conclusion that counsel's failure to interview Hagler and call him as a witness did not constitute deficient performance is somewhat problematic. The Court of

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[4] [Court of Appeals' Footnote 9] Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

[5] [Court of Appeals' Footnote 10] 30 Wn.App. 794, 638 P.2d 601 (1981).

[6] [Court of Appeals' Footnote 11] Byrd, 30 Wn. App. at 799.

Appeals, in ruling on this issue, had the benefit of Warren Hagler's declaration. In that declaration, Hagler provided details about his interaction with Brandy Bonin-Gamble. The Court of Appeals apparently relied on many of those details to reach its conclusion that counsel's failure to interview Hagler, and to call him as a witness, did not constitute deficient performance.

However, the Court of Appeals' analysis of why counsel might have viewed Hagler's potential testimony as problematic makes sense only if counsel had sufficient information to make that assessment. It is not clear from the record that he did. The declaration of Billie Harris, which was also provided to the state courts in conjunction with petitioner's personal restraint petition, suggests that the only facts which were passed along to counsel were that Hagler had a conversation with Brandy Bonin-Gamble during the summer of 2002, and that during that conversation Bonin-Gamble told Hagler she was going to testify against petitioner and she was going to say whatever the police wanted her to say because otherwise they would put her in jail. (*See* Dkt. No. 18, Ex. 6 at 33.) It seems unlikely that this limited amount of information would have allowed counsel to draw the conclusions suggested by the Court of Appeals.

Nonetheless, the record amply supports the Court of Appeals' conclusion that petitioner was not prejudiced by counsel's alleged deficient performance because nothing in the record suggests that Hagler's testimony would have altered the outcome of the trial. It appears that Hagler's testimony would have been inconsistent with the defense theory of the case and with much of the medical and forensic evidence presented by the prosecution. Moreover, the record suggests that Hagler might not have been a particularly credible witness and it is conceivable that he might have undermined petitioner's credibility.

Despite the apparent deficiencies in the analysis by the Court or Appeals, the Court of

Appeals' conclusion that petitioner was not prejudiced by counsel's alleged deficient performance with respect to Hagler was reasonable. Petitioner makes no showing to the contrary. Accordingly, petitioner's federal habeas petition should be denied with respect to his first ground for relief.

2. Applebee's Receipt

Petitioner asserts in his second ground for relief that counsel's failure to introduce at trial an Applebee's Restaurant receipt constituted deficient performance. Petitioner provides no facts in his habeas petition to explain the significance of the Applebee's receipt or counsel's failure to introduce it. A review of petitioner's personal restraint petition offers some insight into these issues. The personal restraint petition indicates that the receipt in question, which was obtained from a friend of petitioner's, would have shown that food was purchased from Applebee's Restaurant on March 2, 2002. (Dkt. No. 18, Ex. 6 at 30.) Petitioner's position appears to be that the receipt would have corroborated the testimony of petitioner and his friends that they went to Applebee's on that date to pick up an order of food and left the victim alone in the hotel room. (*Id.*, Ex. 6 at 45.) This was significant because it would have established that the victim had an opportunity to escape from petitioner but did not do so. (*Id.*) Petitioner's counsel referred to the receipt in his closing argument to support the proposition that the victim had an opportunity to escape, but he never introduced the receipt into evidence during the trial. (*Id.*, Ex. 6 at 45-46.)

The state courts rejected this claim in petitioner's personal restraint proceedings. The Court of Appeals explained its conclusion as follows:

> The Applebee's receipt. During closing argument, Crowley contended the State had no answer for Harris's friends' testimony that Bonin-Gamble was left alone in the motel room while the three men got food from the restaurant:

> So they can't explain that away, there's too many witnesses for them to explain away, ladies and gentlemen, they can't explain it away.
>
> They get food, there is a receipt, it happened, Brandy was able to leave on her own accord, she didn't because she didn't want to.

The prosecutor responded that the only receipt in evidence was from McDonalds:

> Mr. Crowley mentioned a receipt. There was no receipt from Applebee's. There is no receipt from Applebee's. The only receipt is from a McDonald's. And you will notice when you look at that receipt, that two meals were not purchased, just one. Just one meal. There's two people, but only one meal was purchased. And I would suggest to you that that meal was for Mr. Harris, not for Brandy.

Harris provides a declaration from Crowley's investigator, who says she obtained an Applebee's receipt from a defense witness, provided it to Crowley and speculates that he lost it. But even if Crowley's performance was deficient, Harris fails to show prejudice. Counsels' references to the receipt were isolated, minimal in proportion to their overall arguments, and as the State points out, immaterial given the undisputed evidence of other times that Harris left Bonin-Gamble alone. And because the receipt was for takeout food, it would not have established all three men in the room left Bonin-Gamble alone in any event.

(Dkt. No. 18, Ex. 2 at 8.)

Counsel's reliance on the receipt during closing arguments suggests that his failure to introduce the receipt into evidence was careless and not strategic. Nonetheless, the Court of Appeals' conclusion that petitioner was not prejudiced by counsel's failure to introduce the receipt was reasonable. While the receipt would have established that food was purchased on the date in question, it would not have established that the victim was necessarily left alone. Moreover, the record makes clear that there were other times during the course of the victim's ordeal when she was left alone which would appear to minimize the significance of her being left alone on this particular occasion. Petitioner offers nothing in these proceedings to demonstrate that the decision

of the state courts with respect to this claim was contrary to, or constituted an unreasonable application of, federal law. Accordingly, petitioner's federal habeas petition should be denied with respect to his second ground for relief.

3. Closing Argument

Petitioner asserts in his third ground for relief that his counsel's failure to object to the prosecutor's misconduct during closing argument constituted ineffective assistance of counsel. The claim, as presented in the petition, is not a model of clarity. However, at issue appears to be the prosecutor's reference, during his rebuttal closing argument, to a McDonald's receipt which the prosecutor indicated showed only one meal while petitioner claims that the receipt actually listed two meals.

The state courts rejected this claim in petitioner's personal restraint proceedings. The Court of Appeals explained its decision as follows:

> Failure to object to closing argument. Harris also claims Crowley should have objected to the rebuttal argument quoted above because the McDonald's receipt actually listed two meals.[7] He contends the argument unfairly implied he "was a mean, sadistic, sexist person" because he shared no food with the hungry, injured Bonin-Gamble. But Harris does not provide the receipt. And, as he acknowledges, the prosecutor's characterization was understandable given a police officer's description of the receipt.[8] Harris has not shown the argument exceeded counsel's

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[7] The specific argument at issue was:

> Mr. Crowley mentioned a receipt. There was no receipt from Applebee's. There is no receipt from Applebee's. The only receipt is from a McDonald's. And you will notice when you look at that receipt, that two meals were not purchased, just one. Just one meal. There's two people, but only one meal was purchased. And I would suggest to you that that meal was for Mr. Harris, not for Brandy.

[8] [Court of Appeals' Footnote 12] The officer testified the receipt showed: "One – two cheese burger meals, one – two apple pies, one 16-ounce vanilla shake."

> wide latitude to draw inferences from the evidence.[9]
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> Nor has Harris shown prejudice. Any problem Harris had with the jury's perception of his attitude toward women was much more clearly presented by his own testimony on cross-examination discussing Bonin-Gamble's alleged attack on him: "A woman needs to stay in a woman's place. When a woman comes out of their place, whatever happens after that happens, you know."

(Dkt. No. 18, Ex. 2 at 9.)

Petitioner makes no showing that this decision was unreasonable or inconsistent with firmly established federal law. A prosecutor has wide latitude during closing argument to make reasonable inferences based on the evidence. *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991). The prosecutor's argument with respect to the McDonald's receipt can be reasonably construed as such an argument. It thus appears that there was no basis for petitioner's counsel to object to this portion of the prosecutor's closing argument.

In addition, this Court must concur with the conclusion of the Court of Appeals with respect to the prejudice issue. Petitioner's own testimony on cross-examination no doubt affected the jury's perception of his attitude towards women more than the prosecutor's brief reference to the implications to be drawn from a McDonald's receipt. As petitioner makes no showing that the state courts' decision with respect to this claim was contrary to, or constituted an unreasonable application of, federal law, petitioner's federal habeas petition should be denied with respect to his third ground for relief.

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[9] [Court of Appeals' Footnote 13] State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Harris adds a claim in passing that the prosecutor's arguments were reversible misconduct regardless of counsel's failure to object. Because the argument was not improper, this claim also fails.

4. Cumulative Prejudice

Petitioner asserts in his fourth ground for relief that the three claimed instances of ineffective assistance accumulated to cause prejudice. Although no single error may warrant habeas relief, "the cumulative effect of multiple errors may still prejudice a defendant." *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (*citing United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)). In this case, petitioner has established no constitutional error arising out of his claims. Accordingly, there is nothing to accumulate to the level of a constitutional violation. *See Mancuso* 292 F.3d at 957 (*citing Fuller v. Roe*, 182 F.3d 699, 704 (9th Cir. 1999), overruled on other grounds, *Slack v. McDaniel,* 529 US 473 (2000)). Thus, petitioner's claim of cumulative error is without merit and his federal habeas petition should therefore be denied with respect to his fourth ground for relief.

Blakely Claim

Petitioner asserts in his fifth ground for federal habeas relief that his exceptional sentence violates the rule announced in *Blakely v. Washington*, 542 U.S. 296 (2004). The Washington Court of Appeals rejected this claim "because Blakely is not given retroactive effect and Harris's conviction was final before Blakely was issued." (Dkt. No. 18, Ex. 2 at 10 (footnote omitted).)

Though the United States Supreme Court recently granted certiorari in *Burton v. Waddington*, No. 03-35095, 2005 U.S. App. LEXIS 15497 (9th Cir. July 28, 2005), *cert. granted*, 126 S. Ct. 2352 (2006), and will address the issue of *Blakely* retroactivity, there is no current United States Supreme Court precedent holding that *Blakely* may be applied retroactively to cases such as petitioner's which became final before *Blakely* was decided. Accordingly, petitioner's federal habeas petition should be denied with respect to his fifth ground for relief as well.

CONCLUSION

For the reasons set forth above, this Court recommends that petitioner's federal habeas petition be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 18th day of January, 2007.

Mary Alice Theiler
United States Magistrate Judge